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SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mr. TOMKA (Czechoslovakia)
(Vice-Chairman)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. de SARAM (Sri Lanka), speaking on the topic of State responsibility and referring particularly to the question of countermeasures, said that article 30 of part one of the draft articles on the topic, in which the concept of countermeasures was first introduced, was based on relatively scant jurisprudential or other material. The question undoubtedly fell under the heading of progressive development rather than of codification of international law, and involved a fundamental dilemma as to the ways of ensuring, with due consideration of legal proprieties, that a State alleged to have committed an internationally wrongful act either proceeded to dispute settlement or acknowledged its wrong and made the necessary amends. The Special Rapporteur's view, which served as the basis for the draft articles proposed by him on the question of countermeasures, was that given the present relatively decentralized and non-institutionalized nature of the world community, and in the absence of well-developed international procedures to ensure observance of the law, it was necessary, albeit regrettably, that the future convention on State responsibility should allow an injured State to take countermeasures - or, in other words, to commit an internationally wrongful act against the State it believed to be responsible for the injury, the entitlement to take countermeasures being, of course, circumscribed by a number of qualifications and limitations. That view had been questioned by several members of the Commission who were not convinced that countermeasures were an appropriate means of coercing a State alleged to have committed an internationally wrongful act to go to dispute settlement or to acknowledge its wrong and make amends.

2. While Sri Lanka was not, at the present stage of deliberations, entirely committed to the latter view, it nevertheless felt that it should be given full consideration. The first question that arose related to the wording of article 30 of part one. The purport of the article seemed to be that although a countermeasure constituted a breach of an international obligation, the breach was, in the circumstances, not wrongful but, rather, legitimate. His delegation wondered why the reverse formulation - one placing the burden of proof upon the State taking the countermeasure - had not been adopted. The point was by no means a facetious or peripheral one. The location of the burden of proof was of enormous importance in an international dispute-settlement process because of the great difficulty of assembling the necessary testimony in international proceedings. Moreover, the other circumstances in which, under articles 29 and 31 to 34 of part one, wrongfulness would be precluded were objective circumstances which could be ascertained relatively easily. In the case of countermeasures, however, the traditional view was that a State incurring injury might rightly take a countermeasure merely on the basis of a bona fide belief that the State against which the countermeasure was to be directed had been responsible for

(Mr. de Saram, Sri Lanka)

the injury. To establish that a State had in fact not acted in such bona fide belief was often difficult or impossible. It therefore seemed likely that if article 30 continued to stand in its present form, a State taking a countermeasure might in many cases do so with impunity.

3. The assumption upon which article 30 and the Special Rapporteur's draft articles on countermeasures were based was that the countermeasures procedure was necessary in international relations in order to ensure that States complied with their international legal obligations. Against that view it might be argued that States usually did observe their international legal obligations, cases of non-observance being for the most part not deliberate, but due to genuine oversights, misunderstandings or differences of opinion. Moreover, the possibilities for effective bilateral or multilateral diplomatic protestations, as well as for measures of retortion not amounting to a breach of an international obligation, were not inconsiderable and, if resorted to, were likely to prove effective.

4. If, despite those and other possible objections, the countermeasures procedure was to be included in the future convention, it would, of course, be necessary to circumscribe it with a large number of qualifications and limitations. In that connection, he remarked that the issue of countermeasures that would not be permissible under any circumstances, dealt with in draft article 14 as proposed by the Special Rapporteur (A/47/10, footnote 48), came perilously close to touching upon some of the fundamental provisions of the Charter of the United Nations set forth, for example, in Article 2, paragraph 4, and Articles 51, 41 and 42. Complexities also arose in defining the circumstances in which countermeasures would be permissible in cases where more than one State considered itself to have been injured. The question of who the injured States were, the extent of their entitlement to have recourse to a countermeasure and the question of the countermeasure's proportionality, viewed not only individually but also collectively, would be difficult to answer with precision.

5. It should not be forgotten that those who would be principally called upon to implement the future convention were departments or ministries of foreign affairs, which were frequently understaffed and obliged to work under pressure. There was much to be said, therefore, for a convention whose provisions were as uncomplicated and unambiguous as possible.

6. Lastly, there were some general conceptual questions that could not be ignored. Given the present status of international law and of relations between States, and in view of their future development, was it necessary or justifiable to recommend to Governments the adoption of a provision under which a Government, thinking itself wronged by another State, might in effect take the law into its own hands and take a countermeasure rather than resort to dispute-settlement procedures, as Governments were urged to do on other occasions? Unquestionably, too, the ability to take effective countermeasures differed from one State to another depending on its size, wealth and strength.

(Mr. de Saram, Sri Lanka)

7. All those considerations tended to support the view that the countermeasure procedure, which might well have served a useful purpose in earlier times, was somewhat of an anomaly today - aside, of course, from self-contained treaty regimes which provided for countermeasures in the event of a breach of a treaty obligation. The question of countermeasures should be considered in relation to that of the settlement of disputes. It might be possible to expand existing dispute-settlement procedures to include additional and innovative ones so as to ensure that a State believed to be in breach of an international obligation did not evade settlement of the differences which had arisen. In that connection, reference might usefully be made to existing conventions in the environmental and other fields which included provisions on the monitoring of the fulfilment of treaty obligations by States parties. The concept of the interim measure of protection might also be developed to ensure that a State was in a position to preserve its interests against the consequences of a wrongful act by another State until such time as the differences that had arisen were resolved.

8. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

9. Mrs. FLORES (Uruguay) said that two of the main difficulties with the legal regime of countermeasures were the inability of domestic law to provide much assistance with respect to countermeasures, and the absence, in the international community, of any institutionalized remedies to be put into motion against a State which committed an internationally wrongful act. Consequently, the injured States were bound to rely upon their own unilateral reactions. A further question was whether countermeasures were compatible with modern international law. Some members of the Commission had adverted to the danger that more powerful States might impose their authority on weaker States through the use of countermeasures. The question had been further raised whether countermeasures were compatible with Article 2, paragraphs 3 and 4, and Article 33 of the Charter and modern international law, taking into account Article 103 of the Charter. Reference had also been made to the numerous General Assembly resolutions and the provisions of regional international instruments which expressly prohibited the use of reprisals, whether or not they involved the use of force.

10. Yet another question raised was whether the Commission should prescribe that an injured State might "take the laws into its hands". Concern had also been expressed that the very concept of countermeasures seemed to be antithetical to some fundamental principles, including the principle of sovereign equality of States, equality before the law, and the principle of peaceful settlement of disputes. An additional reason for concern cited was that countermeasures could give rise to abuse and start spirals of escalation detrimental to the stability of international life.

11. Many members, while recognizing that the question of countermeasures should be approached with great circumspection, felt that the Commission could not ignore the realities of international life, and should provide in the

(Mrs. Flores, Uruguay)

draft for a regime of countermeasures, since a certain degree of coercion had to be tolerated in any society, provided that it did not go beyond certain limits.

12. The regulation of countermeasures was viewed as a constructive way of promoting respect for the law as long as it aimed at eliminating their punitive component, compelling States to return to compliance with the law, and subjecting the underlying dispute to third-party settlement procedures. The objective of such an approach was to reduce to a minimum the scope of permissible unilateral initiatives.

13. As far as terminology was concerned, her delegation shared the view that the term "countermeasures", which was neutral and had been used by the Commission in article 30 of part one of the draft, should be given preference over the term "reprisals".

14. It should be pointed out that the wrongfulness of an act of a State was not precluded if that act was a consequence of an internationally wrongful act committed by another State. In draft articles 11, 12 and 13 of his fourth report, the Special Rapporteur had proposed certain conditions under which an injured State could lawfully resort to countermeasures. Draft article 11 defined those conditions as the actual existence of an internationally wrongful act, the prior submission by the injured State of a "demand" of cessation/reparation and the absence of an "adequate response". In her delegation's view, the injured State would thus be transformed into both judge and party, since it would itself determine whether a wrongful act had been committed. It would also determine whether the "demand" had been submitted, since the article provided no procedure for the objective evaluation of compliance with that condition. Finally, it was again the injured State which would decide if reparation had been made, thereby effectively determining the reparation. The determination of whether each of the conditions had been met could in turn give rise to disputes which could result in further wrongful acts. There might also be cases where there had been no prior wrongful act and the State which had made such a claim, as a result of which it had resorted to countermeasures, had thus committed two wrongful acts.

15. Paragraph 1 (a) of draft article 12 provided for the exhaustion of all amicable settlement procedures before an injured State had recourse to countermeasures. That condition could delay the attainment of some of the objectives sought through resort to countermeasures, particularly a rapid solution to the dispute. That was due to the fact that there were many procedures for the peaceful settlement of disputes; the provision did not establish an order of priority for implementing the procedures; and States were under no obligation to settle all their disputes by peaceful means, only those which could endanger international peace and security.

16. It was clear that where there was no will to settle it, a dispute could be prolonged indefinitely without resort to countermeasures. Also, it would

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be for the parties to decide whether the procedures for the peaceful settlement of the dispute had been exhausted. In such a case, the State which had allegedly committed the wrongful act and which considered that the procedures for peaceful settlement had not been exhausted could claim that the injured State was acting wrongfully by resorting to countermeasures.

17. The provisions of draft article 12 might mean that States parties to the 1948 American Treaty of Pacific Settlement would not be able to resort to countermeasures among themselves, for the Treaty did not provide that disputes submitted to procedures for peaceful settlement should be necessarily settled by those means. The draft articles should perhaps take account of that possibility.

18. Her delegation further noted that paragraphs 1 (b) and 2 (a) of draft article 12 could lend themselves to subjective interpretations. It also considered that measures of protection taken by an injured State were countermeasures and should not be the object of an exception. For its part, paragraph 3 of article 12 should be drafted with greater clarity.

19. Article 13 raised the problem of who would determine proportionality and on the basis of what criteria. Article 14 required more study; it was important to remove superfluous references and to introduce more specific terms.

20. Her delegation considered that the way to deal with the consequences arising from a wrongful act was not to commit another wrongful act. Efforts should be focused instead on the elaboration of an adequate system for the peaceful settlement of disputes. Furthermore, it should be a third party that determined the existence of a wrongful act, the measures to be adopted, and the proportionality of the response.

21. Mrs. GOLAN (Israel) said that her delegation considered the topic of State responsibility and its anticipated codification to be essential to the development of international law. Referring to the question of countermeasures and in particular to draft articles 11 to 14 and 5 bis proposed by the Special Rapporteur in his fourth report (A/CN.4/444 and Corr.1 and Add.1, 2 and 3), she said that her delegation agreed with the view that, owing to the complexity of the problem, it was questionable whether countermeasures had a place in the law on State responsibility. Further consideration by delegations and by the Commission was called for. The subject should be approached with extreme caution, emphasis being placed on the role of peaceful settlement of disputes, the promotion of respect for law and the avoidance of punitive action and abuse.

22. So far as terminology was concerned, her delegation agreed with the Special Rapporteur's view that, for the purposes of the draft articles, the notion of countermeasures was identical to that of reprisals, but felt that the term "countermeasures" should be given preference over the term

(Mrs. Golan, Israel)

"reprisals" as being more neutral and less associated with the use of force. Her delegation also agreed that a distinction should be drawn between crimes and delicts in the context of countermeasures, and that countermeasures should, at the present stage, apply only with regard to delicts.

23. Referring to draft article 11, she agreed with the remark made in the Commission and reported in paragraph 168 of its report (A/47/10) that a State which based its conduct on the existence of an internationally wrongful act acted at its own risk and might be held responsible if it turned out that none of its rights had, in fact, been infringed. With regard to draft article 12, her delegation felt that further elaboration was needed with a view to achieving a balance between the importance of controlling the use of countermeasures and the importance of not giving an undue advantage to the wrongdoing State. As for draft article 13, a more precise definition of the scope of proportionality was desirable.

24. Turning to paragraph 1 (a) of draft article 14, she said that her delegation, while agreeing with the Special Rapporteur that the concept of countermeasures differed from those of self-help, self-defence, state of necessity, humanitarian intervention and armed intervention for the protection of nationals, would prefer the paragraph to include a general reference to the Charter of the United Nations. In connection with paragraph 1 (b) (i) of the draft article, her delegation took the view that not every human right qualified as constituting an absolute limitation, and felt that the point should be further specified. With regard to paragraph 1 (b) (ii), its view was that the breach or suspension of diplomatic relations was a countermeasure often employed by States and should not be prohibited. In paragraph 1 (b) (iii), a reference to "basic rules of international law" would be preferable in view of the difference of opinion existing in relation to jus cogens. Her delegation accepted paragraph 1 (b) (iv), which provided a useful guarantee to third States.

25. Lastly, referring to paragraph 2 of draft article 14, she said that her delegation preferred the third alternative mentioned in paragraph 247 of the Commission's report prohibiting countermeasures which jeopardized the territorial integrity or political independence of States, without referring to political and economic coercion.

26. Mr. KRAICHITTI (Thailand) said that, owing to the imperfect nature of international law enforcement mechanisms, a State victim of an internationally wrongful act might, in certain exceptional circumstances, have no choice but to take unilateral action against the wrongdoing State in order to put an end to that wrongful act or to force that State to comply with international law. Where the injured State exhausted all peaceful means to attain that objective, it might need a legal basis for measures which it might take against the State that had committed the wrongful act.

27. In view of the unequal ability of States to take effective countermeasures, the Commission had to take the greatest care in determining

(Mr. Kraichitti, Thailand)

the conditions for lawful resort to such countermeasures, in order to ensure that such inequalities among States did not unduly operate to the advantage of the strong and rich over the weak and poor. Given the paucity of State practice and judicial decisions on countermeasures, the attempt to codify or extract customary rules from existing practice must be carried out by taking into consideration the inequality of States. Otherwise, it might be viewed as an attempt to legitimize uncertain and controversial concepts by powerful States which could easily enjoy an advantage over weak or poor States in the use of countermeasures.

28. In order to prevent their possible abuse, countermeasures should be viewed as interim measures to secure the cessation of the wrongful act and compliance with international law, and must cease or be reversed once the purpose had been achieved. Countermeasures should not involve the use of armed force and should be distinguished from self-defence. In defining the regime of countermeasures, particular attention should be paid to the situation of weak, developing States, whose ability to take effective countermeasures differed quite obviously from that of developed States. The focus should be on the cessation of the internationally wrongful act and recourse to an agreed mode of settlement as the justification for countermeasures, which should not have any punitive function. Before taking any countermeasure, an injured State should exhaust all other available measures for the peaceful settlement of disputes, in accordance with the Charter. Such a provision was necessary in order to prevent the abuse of countermeasures by stronger States. Countermeasures taken by an injured State should be proportionate to legitimate aims, such as cessation of the internationally wrongful act and reparation. Excessive countermeasures might be tantamount to punitive measures.

29. In view of the paucity of State practice, his delegation shared the view that in developing the concept of countermeasures further, the Commission should identify and supplement the progressive elements which had emerged from recent practice in order to strengthen the safeguards against possible abuses of countermeasures.

30. Mr. MAMEDIAROV (Azerbaijan) said that, in a rapidly changing world, it was very important that international law should hold a respected place. The Commission must therefore continue to play its constructive, scholarly and independent role by directing its efforts towards the establishment of an international legal framework for future generations.

31. After 43 years, the Commission had made no substantial progress on the topic of State responsibility. That topic currently had a new urgency, for the world community was witnessing a number of serious armed conflicts, despite the end of the cold war. One example of such conflict was the military action perpetrated against his country by the Republic of Armenia in violation of the Charter and of the numerous General Assembly resolutions which provided for non-interference in the internal affairs of States.

(Mr. Mamediarov, Azerbaijan)

Indeed, the Republic of Armenia was openly supporting the separatist movement in Azerbaijan and was making aggressive claims on his country's territory. His delegation hoped that the completion of a final draft on State responsibility would be a major contribution to the stabilization of international relations, the disappearance of inter-State confrontations and the creation of a favourable climate among countries.

32. The draft articles should not be subordinate to the Charter or to any recommendations or decisions of the Security Council. They should, however, be in conformity with the rules and procedures of the Charter concerning the maintenance of international peace and security.

33. His delegation recognized that countermeasures reflected the incompleteness of international law. The law codified thus far by the international community did not provide any institutionalized remedies against a State that committed an internationally wrongful act. The injured States were bound to rely mainly, in so far as general international law was concerned, upon their own reactions. In its discussions on countermeasures, the international community should always take into account which acts of the wrongdoing States led the injured State to take countermeasures.

34. His delegation shared the Commission's view that injured States which took countermeasures were often themselves wrongdoing States, while the States alleged to be in breach of their international obligations were often themselves the victims of injustice. The Commission therefore had to exercise the greatest care in choosing the words used to describe the injured and wrongdoing States respectively.

35. With regard to draft article 12, which provided that an injured State should not resort to countermeasures until faced with the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it was a party, his delegation feared that the world community might face situations in which wrongdoing States continued their internationally wrongful acts indefinitely. His delegation was convinced, moreover, that draft article 12 was contrary to Article 51 of the Charter.

36. Ms. WILLSON (United States of America) said that, broadly speaking, the approach of the Drafting Committee on the topic of State responsibility appeared to be on target on the issues of cessation and reparation. She hoped that the Drafting Committee would complete its work on those articles during the first part of its session, and that the draft commentaries would be available to members of the Committee sufficiently early to make that possible.

37. On the subject of countermeasures, the starting-point must be the recognition of the fact that countermeasures were the means by which an injured State brought about cessation or an agreement to resolve the dispute peacefully. To place excessive burdens on the injured State would serve only

(Ms. Willson, United States)

to strengthen the position of the wrongdoing State. Requiring, for example, the exhaustion of all other methods of dispute settlement as a precondition misperceived the important role of countermeasures in inducing agreements for the settlement of disputes. The Commission should also recognize that countermeasures must not be grossly disproportionate and that certain acts were impermissible in any circumstances. That did not mean that it was necessary or useful for the Commission to explore the notion of proportionality, the entire field of impermissible acts, the scope and authority of principal organs of the United Nations, or key principles of the Charter already dealt with in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. Her delegation's reason for that view was not a desire to retain the artificial distinctions found in part one of the Commission's draft. Indeed those distinctions should be reconsidered before they were used as a basis for future work. The Commission should keep its work on the subject as simple and as narrowly confined as possible, in the interest of the expeditious elaboration of a text capable of widespread acceptance by States.

38. Likewise, the Commission should not base its drafting of part two on the assumption that it would be possible to obtain widespread acceptance of meaningful dispute-settlement provisions for the whole of international law. The realistic goal must be to seek the simplest possible treatment of the subject consistent with the existence of a regime that would encourage or induce States to settle their disputes in a peaceful and expeditious manner.

39. Her delegation urged the Commission to give sufficient priority to the topic in order to ensure that the first reading of all the parts would be completed in time for the Commission to review the whole, prior to submitting it for the formal written comments of Governments.

40. Ms. SEAGROVE (Australia) said that the issue of international liability for injurious consequences arising out of acts not prohibited by international law was of ever growing importance in a world where there was increasing concern about the protection of the environment. It was therefore crucial for the Commission to move towards concluding its work on that issue. In that respect, the question of determining when a State had an obligation to provide a remedy for damage was of great significance. It was therefore regrettable that the Commission was focusing on the issue of prevention, rather than on reparation and compensation for injury; the issue of prevention was relevant to the core issue of liability in only a limited number of cases.

41. Her delegation did not consider that liability was premised on the wrongfulness of the act causing the damage. Its position was supported by principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, which related to cases in which it was unnecessary, in determining the question of liability, that there should be any wrongful act on the part of the State concerned. Her delegation had no theoretical difficulty with a legal regime which recognized that even if certain types of

(Ms. Seagrove, Australia)

harm might not be the result of an unlawful act, compensation might still be required by law. That was the case in relation to the nationalization of property. A regime of strict liability could be an effective mechanism for achieving a balance of interests between the States concerned. It would be particularly useful in cases where the risk of damage could not be completely avoided by preventive measures, but nevertheless the world community recognized the desirability of the particular activity and did not condemn it as unlawful. It also had the benefit of forcing States to take into account the interests of innocent victims not under their jurisdiction or control when deciding whether to permit such an activity and how it should be regulated.

42. Her delegation believed that there was a need for a treaty setting down clear rules governing liability, but agreed that consensus might be more readily reached on guidelines or statements of principle in the first instance. The early development of such guidelines or statements of principle would assist in the further analysis of the issue in the many forums where it was currently under consideration. The formulation of such guidelines should not preclude further work by the Commission on drafting articles for a treaty.

43. On the topic of State responsibility, her delegation welcomed the Commission's desire to accelerate the pace of work, and hoped that a first reading of all draft articles would be completed by the end of the current quinquennium. The draft articles that had been provisionally adopted struck a reasonable balance between the various elements of reparation. However, since controversial issues still remained to be resolved within the Commission, it would be premature to consider them in the Committee at the current session. With regard to draft article 4, and the question raised by the Special Rapporteur on the relationship between that draft article and the Charter of the United Nations and recommendations or decisions adopted by the Security Council, her delegation did not believe that such questions needed to be resolved in connection with the draft articles. In any event it would be extremely difficult, if not impossible, to devise a formula which would apply to all cases.

44. Australia welcomed the steps taken within the Commission to review its programme of work in order to set priorities; it also supported the important interaction between the Commission and the Committee and hoped that it would be enhanced.

45. Mr. CALERO RODRIGUES (Brazil), referring to the topic of international liability, said that during the forty-sixth session, his delegation had been optimistic in its assessment of the progress made by the Commission in coming to an understanding of some fundamental issues which had hindered work on the topic. His delegation had believed that the Commission had established a clear basis for the elaboration of draft articles; that the drafting process could go forward without the hindrance of renewed debates on essential questions; that the scope of the topic had been satisfactorily defined to include both activities involving the risk of transboundary harm and

(Mr. Calero Rodrigues, Brazil)

activities actually causing such harm, thus justifying provisions on prevention and compensation; and that even if all the issues had not been fully resolved, the main thrust of the instrument to be drafted had been sufficiently delineated.

46. Unfortunately, the Commission's current report (A/47/10) clearly indicated that erroneous assumptions had been made. The Commission had not adopted any articles and had not even engaged in drafting. Old uncertainties seemed to have been revived and the climate of indecision which in the past had prevented the development of the topic threatened to return.

47. The nine articles on prevention proposed by the Special Rapporteur represented an attempt to revise previously submitted texts in the light of debates in the Commission and the Sixth Committee. The one new element was the Special Rapporteur's suggestion that the articles should be placed in an annex to the instrument so that they would be non-binding. That was based on the consideration that the majority view in both the Commission and the Committee favoured a separate instrument of a recommendatory nature on the "procedural", as opposed to the substantive, obligations of preventing transboundary harm (A/47/10, para. 283).

48. The recommendations of the Working Group (A/47/10, paras. 344 to 349) provided guidance for the next stage of the Commission's work. The Special Rapporteur was requested to examine further the issues of prevention, but only in respect of activities having a risk of causing transboundary harm. Prevention in respect of activities actually causing harm was not to be considered at the current stage. His delegation wondered whether there were sound reasons for not considering simultaneously all obligations of prevention, and believed that the differences between the two types of activities were not such as to warrant separate treatment.

49. With regard to the next stage of the work, paragraph 346 of the Commission's report stated that the Commission should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm, and then with articles on the remedial measures to be taken when such activities had caused transboundary harm. In his delegation's view, once remedial measures had become necessary, the activity was to be considered not as creating a risk of causing transboundary harm, but as an activity causing harm. Brazil had always held that remedial measures should apply to all situations in which transboundary harm was caused, whether or not the risk of such harm being caused was known to exist. The undoing of the harm, through the restoration of the previous situation or through compensation, should be required whenever transboundary harm occurred. The basic principle, which the Commission had repeatedly reaffirmed, was that the innocent victim should not be left to bear the loss. The Commission's current work plan raised the possibility of the abandonment of that principle.

50. It was difficult to accept the view, stated in paragraph 344, that a final decision on the scope of the topic would be premature. After all, the

(Mr. Calero Rodrigues, Brazil)

topic had been under consideration by the Commission for more than 10 years. At the current stage, it would be retrograde for the Commission to adopt a piecemeal approach, leaving under a cloud of uncertainty the full development which it intended to give to the draft articles. It was to be hoped that the Commission would reconsider its position.

51. Mr. CORELL (Sweden), speaking also on behalf of Denmark, Finland, Iceland and Norway, said that the Nordic delegations noted the Commission's decision slightly to shift the emphasis in its further work on the topic of international liability. That new direction was reflected in the request that the Special Rapporteur for the topic, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect.

52. It should be borne in mind that the Commission's work on international liability had begun as an offshoot of its work on the topic of State responsibility, and that the two topics were still interlinked. The current drafting exercise had a twofold objective: on the one hand, to prevent damage and to provide reparation when damage had occurred; and on the other, to agree on a framework for guaranteeing that innocent victims, whatever legal subjects they might be, were protected from the consequences of transboundary harm, and that prompt and adequate compensation was made for damage. The topic should thus be understood as comprising issues related to both preventive and remedial measures, but the latter should be dealt with by the Commission only at a later stage.

53. The Nordic countries were not fully convinced that that new direction was entirely logical or effective in all respects. While it made good sense to use the broader concept of "activities having a risk of causing harm" when the Commission discussed prevention, they were concerned that the separation of the issue of "prevention" from that of "remedial measures" might cause an undesirable delay. In their view, the two issues should not be treated separately.

54. Since the Commission had already worked for 14 years on the topic of international liability, most of the relevant concepts had already been aired more than once, and it was high time that the results of those deliberations were submitted to the Sixth Committee.

55. In view of the increasing number of international agreements which addressed the question of liability either directly or indirectly, it was to be hoped that the Commission could assist global or regional efforts to that end by providing a document which would contain the basic elements to be included in a legal framework. Such a document would make a much-needed contribution to the progressive development of international law, particularly at a time when the entire world was launching an offensive against environmental degradation.

(Mr. Corell, Sweden)

56. The Nordic delegations had stated in the Sixth Committee on previous occasions that they would favour a binding framework convention on the subject. However, since the topic was so complicated, and was now a matter of some urgency, there was merit to be found in the idea that the Commission should elaborate a "declaration" or a "statement of principles" at the current stage. On the basis of such a document, it could then produce a more detailed instrument on international liability.

57. The Nordic delegations did not share the concern that the elaboration of a declaration or statement of principles could prejudice later steps to be taken by the Commission. There were many important precedents in the field of international law where a codification of legal rules had begun with the establishment of a declaration of principles, a manual or a memorandum of understanding. Their concern was rather that a confusing, and perhaps even contradictory, complex of law would develop if no general guidance was available.

58. Since demands for the attribution of international liability for injurious consequences arising out of acts not prohibited by international law were most likely to arise from situations in which the environment of a State might be affected, it would be a natural starting-point to take a closer look at the results of the United Nations Conference on Environment and Development.

59. In particular, the Nordic delegations were pleased to note that the international community had reaffirmed, in principle 2 of the Rio Declaration that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. By its unanimous adoption of the Rio Declaration, the international community had set the stage for the progressive development of international law regarding transboundary environmental issues.

60. On the basis of the Rio Declaration, the Sixth Committee was now in a position to give the Commission more specific guidance in respect of further work on the topic and the elements to be included in a draft document. The Nordic delegations considered that a declaration or statement of principles should reaffirm the commitment enunciated in principle 2 of the Rio Declaration. It should encourage States to enact and implement environmental legislation and to regulate potentially harmful activities in order to eliminate the risk of harm or reduce it to a minimum. It should urge States to develop national and international law regarding civil liability in order to complement State liability: such law should include non-discriminatory provisions on adequate compensation to innocent victims, as well as restoration. It should note that States were under the obligation to cooperate in an expeditious and more determined manner in further developing international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control

(Mr. Corell, Sweden)

to areas beyond their jurisdiction (on the lines of principle 13 of the Rio Declaration). It should note that States and peoples should cooperate in good faith and in the spirit of partnership in fulfilling the principles embodied in the Rio Declaration (as in principle 27).

61. A declaration or statement of principles should also recommend that States should establish procedures for environmental impact assessment, and apply that control instrument to all proposed activities which might have an adverse transboundary impact on the environment of other States. It should encourage States to develop procedures for prior and timely notification to potentially affected States, as well as procedures for consultation at an early stage and in good faith with those States. It should underline the importance of immediate notification to States of any emergency that might produce sudden harmful effects on the environment of those States. It should recommend that States should accept liability for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. Acceptance of liability by a State for itself, or on behalf of its legal subjects, would provide a means of compensating innocent victims and of restoring the environment of the other State. It should encourage States to adopt domestic measures to provide for effective and non-discriminatory access to judicial and administrative proceedings, including redress and remedy. Lastly, it should stress, on the lines of principle 26 of the Rio Declaration, that States should resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

62. Mr. MIKULKA (Czechoslovakia) said that the slow progress so far achieved on the topic of international liability led his delegation to welcome the Commission's decision to establish an open-ended working group to consider certain issues regarding the scope of the topic and how it should be approached. At the current stage, work on the topic was concerned, on the one hand, with questions relating to prevention - in other words, a kind of code of conduct for activities which might cause or were causing transboundary harm - and on the other, with the question of liability itself in the event of harm. Bearing in mind the need to separate the issues involved so that the Commission could deal with them one by one, his delegation approved the Commission's decision to focus attention at the current stage on activities having a risk of causing transboundary harm, leaving until later consideration of other activities which in fact did cause harm. His delegation welcomed any initiative aimed at achieving a precise definition of the cases in which liability for risk could be envisaged. The Commission could have made even more progress in that regard, limiting the topic under consideration to activities involving exceptional risk.

63. Although the Working Group's decision that the topic should be considered as including both prevention and remedial measures, and that the issue of prevention should be examined first, represented a pragmatic approach, his delegation wished to reiterate that the question of prevention and that of

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remedial measures for transboundary harm caused by activities not prohibited by international law were distinct problems which were not from the legal standpoint conjoined. Indeed, the former might be considered to fall outside the scope of the topic, since non-compliance with the rules relating to prevention would entail State responsibility for wrongful acts within the terms of another topic which was also before the Commission.

64. At the same time, the elaboration of a set of rules concerning prevention represented an attempt to meet at least some of the needs of the international community, and the work already accomplished in that regard indicated that results could be achieved in a relatively short period of time.

65. From a theoretical point of view, his delegation wished to express its reservations with regard to the hypothesis put forward by the Special Rapporteur in paragraph 18 of his eighth report (A/CN.4/443), that transboundary harm caused by activities with harmful effects, when significant, was, in principle, prohibited under general international law, and that an activity of that type could exist only if there were some form of prior consent of the affected States. Such a hypothesis would entail a transition from the concept of liability to that of responsibility for wrongful acts, since prior consent would merely be a circumstance precluding wrongfulness within the meaning of article 29 of part one of the draft articles on State responsibility.

66. The hypothesis would merely lead to further problems, in that reparation for harm caused by an activity involving risk which was carried out without the prior consent of the affected State would be the outcome of an internationally wrongful act and would in consequence fall under the rules of State responsibility for wrongful acts. The harm itself, however, might arise even where the prior consent of the injured State had been given to an activity involving risk which was carried out in the territory of another State. In such a case the question of compensation would no longer be subject to the rules on State responsibility for wrongful acts, but would fall within the purview of liability.

67. In contrast to that hypothesis, the obligation to compensate for harm caused by an activity involving risk should be based on the principle of equity, namely the principle that the innocent victim should not be left to bear the loss.

68. His delegation shared the Commission's view that it would be premature to take a decision at the current stage on the nature of the articles to be drafted or the final form of the instrument.

69. For the time being, the Commission had decided to postpone further consideration of relations between States and international organizations. In fact, the topic did not seem to correspond to any pressing need on the part of either States or international organizations, and the prospects for the

(Mr. Mikulka, Czechoslovakia)

adoption of a further instrument in that connection might give cause for concern in view of the fact that the number of ratifications of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character remained extremely limited. His delegation hoped that that decision would enable the Commission to concentrate all its efforts on the other topics currently before it. At the same time, the considerable work accomplished by the two Special Rapporteurs would provide ample and instructive material for States and international organizations.

70. Turning to the question of the Drafting Committee's methods of work, and the changes concerning the preparation and content of the report to the General Assembly, he expressed the hope that the procedure recommended by the Planning Group would enable the Commission to identify, in 1993, topics likely to be recommended for inclusion in the Commission's programme of work.

71. Mr. YAMADA (Japan), referring to the topic of international liability, said that 13 years had elapsed since the Commission had received the preliminary report on the topic. If the Commission did not adopt a position on the subject without further delay its credibility might suffer. His delegation noted with satisfaction that the Commission had taken decisions at its forty-fourth session on such basic issues as the scope of the topic and the approach to be taken with regard to the nature of the articles or of the instrument to be drafted, and endorsed the Commission's view that, in order to facilitate progress on the subject, it would be prudent to approach its consideration in stages and to establish priorities for issues to be covered.

72. The Commission had also decided that the topic should be understood as comprising both issues of prevention and of remedial measures, but that prevention should be considered first; only after that, would the Commission proceed to the question of remedial measures. In that context, he drew attention to the Special Rapporteur's proposal, in paragraph 283 of the Commission's report (A/47/10), to place the articles dealing with both substantive and procedural preventive rules in an annex. Although it understood the considerations which had led to that suggestion, his delegation none the less felt that provisions on remedial measures must be an integral part of the instrument to be drafted.

73. On the other hand, his delegation appreciated the Commission's decision to deal first with activities creating a risk of causing transboundary harm, and then with activities causing such harm. Having completed the first stage of its work, however, the Commission should carefully consider whether articles on activities causing harm should be included in the instrument, as that might make its scope too broad.

74. Since the topic was related to that of State responsibility (A/47/10, chap. III), Japan had hoped that the work on international liability would take into account the progress made on State responsibility. In the light of

(Mr. Yamada, Japan)

intensifying world-wide concern over the environment, his delegation recognized the growing necessity of establishing rules in that area. It was to be hoped that, in the course of future consideration, the relationship between international liability and State responsibility would be clarified not only conceptually, but also from a practical point of view.

75. Mr. FISSENKO (Belarus) said it was gratifying that in its work on the question of establishing an international criminal court, the Commission had begun with general questions of the desirability and feasibility of establishing such a court, since discussions in the Commission and the Committee and in academic journals had shown that there was no agreement with regard to the need for such a court. It was important to find answers to those general questions since they were bound to have an impact on individual questions of the structure, competence and procedure of an international court. In order to find such answers, it was necessary to consider the international crimes which the court would deal with; since there were various categories of international crimes and various components of such crimes, it was clear that various models of international criminal justice were needed. In different situations, an international court could be either the only resort, or an additional means of achieving justice.

76. The Commission had rightly taken the view that, at least initially, the court should exercise jurisdiction only in relation to individuals, and not to States, and that it should not have compulsory jurisdiction. That approach was based on pragmatic and realistic considerations; the court would clearly have to be developed in stages.

77. His delegation fully supported the Commission's approach that the question of establishing a court could not be resolved in the abstract, and that the drafting of the statute wouuld make it possible to find concrete solutions to specific questions. It agreed that an international court should have a statute in the form of a multilateral treaty concluded by States parties. However, it believed that the court should not be fettered in its action by the classical law of international treaties. The court would have to be fairly closely linked with the United Nations; many questions of its activity could only be resolved on the firm foundation of the United Nations and the powers and authority of its principal organs.

78. His delegation did not feel that there should be a direct link between accession to the statute of the court and accession to the Code of Crimes against the Peace and Security of Mankind, although some kind of link should be maintained between them so as to ensure that the court had a solid codified basis of law and the Code had an effective mechanism for implementation.

79. It was extremely important to decide whether the court would be a permanent or an ad hoc body. His delegation felt that it should be a flexible mechanism that could be brought into operation when the need arose. The Commission's conclusions, taking into account the views and proposals put

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forward in the Committee, could serve as a good basis for work on the topic in the future. The Commission should be given a renewed mandate by the General Assembly to draw up the statute of an international court.

80. On the question of State responsibility, it seemed that the main difficulty lay in the absence, in the international community, of effective institutionalized remedies against States which committed crimes. The injured State was normally compelled to rely on its own resources. The Commission should be particularly careful in formulating conditions and procedures for the lawful use of countermeasures, so as to try to level out the factual inequalities that existed between States. At the same time, the Commission should consider the question of establishing, developing and enhancing institutionalized means of legal protection.

81. There was no doubt that in any society, including the international community, a certain degree of coercion had to be tolerated. Countermeasures must be included in the draft articles, since they were virtually the only means of ensuring compliance with the norms of international law. His delegation agreed that countermeasures were a means of stopping unlawful conduct and encouraging a State which had committed an offence to respect the law, and were not punitive in nature. That was a significant point since, in relations between equal sovereign partners, no one State could pose as a higher authority.

82. Particular attention needed to be paid to the characteristics of countermeasures in relation to international crimes, as there was a significant difference between international crimes and international delicts. International crimes, as violations of the rights and interests of all members of the international community, required a collective response and must entail sanctions within the meaning of that term in the Commission's report (para. 149).

83. The application of countermeasures by the injured State was a necessity. However, such action must be carefully regulated, above all to ensure limits on its use. Countermeasures could not be considered lawful only on the basis of the bona fide conviction of the State in question. A combination of objective criteria was needed, above all refusal to have recourse to a settlement procedure. Meanwhile, the question of who could determine the existence of an internationally wrongful act and the question of the objective criteria necessary for the adoption of countermeasures remained open. One of the procedural conditions for the application of countermeasures should be prior notification of the alleged breach sent to the alleged wrongdoing State. That State needed to know that it had violated the law. The violation of the vital interests of the international community could not occur through negligence.

84. His delegation could support draft article 11. The current formulation allowed for the possibility of the provisional or long-term application of

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countermeasures, and there was no need to find a formulation to stress the provisional character of such measures.

85. It was highly important to take into account the condition of prior exhaustion by the injured State of all settlement procedures, as reflected in draft article 12. In connection with paragraph 1 (a) of that draft article, the final document adopted by the third meeting of experts of the Conference on Security and Cooperation in Europe on the peaceful settlement of disputes, held at Valetta in 1991, contained some useful ideas on the peaceful settlement of disputes. It would clearly be advisable to make provision for the possibility of applying countermeasures in cases where the peaceful settlement procedure did not lead to the settlement of a dispute within a reasonable period of time.

86. His delegation felt that the formulation of draft article 13 was somewhat abstract and needed to made more specific because of the excessive part played by subjective assessment by the injured State. The list of prohibited countermeasures in draft article 14 should be exhaustive, rather than indicative. The general principle that countermeasures should essentially affect relations between States and have a minimum impact on individuals was unrealistic. State responsibility was an example of collective responsibility, and it was not really possible to avoid the consequences of countermeasures for individuals.

87. The section of the report concerned with self-contained regimes was of particular interest to States that were members of the Commonwealth of Independent States, in view of the work that was currently under way to draft a charter for the commonwealth and establish a commission on human rights within it. His delegation fully supported the view that self-contained regimes did not preclude either the validity or the application of the rules of general international law. In its view, that principle should prevail in the process of interaction between the universal legal system and regional systems. It was rare for a regional system to be able to completely replace a universal system, particularly on the question of State responsibility.

88. The Commission should pay particular attention to the characteristics of countermeasures against international crimes in relation to the question of differently injured States.

89. Mr. ZAMORA (Venezuela), referring to the draft articles on State responsibility (A/47/10, chap. III), said that the question of countermeasures should be subject to a thorough analysis with a view to achieving the balance desired by the international community, in the light of the existing inequalities among States; in that connection, he concurred with the Special Rapporteur's observations, as set out in paragraph 124. With regard to draft article 11 as proposed by the Special Rapporteur, his delegation, while agreeing with the focus of the provision, believed that it should be redrafted so as to specify the scope of the harm caused to the injured State and the party which would be responsible for determining that such harm had occurred.

(Mr. Zamora, Venezuela)

90. Concerning draft article 12, his delegation supported the reference in paragraph 1 (a) to the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument. With regard to paragraph 2 (a), however, the same comments applied as in the case of draft article 11; it was unclear who would be responsible for determining that a State had not cooperated in good faith in the choice and the implementation of available settlement procedures.

91. As to draft article 13, while his delegation endorsed the principle of proportionality between the proposed countermeasure and the harm caused, it felt that a more precise definition of the scope and content of proportionality would be desirable, as suggested in paragraph 211.

92. Lastly, with regard to draft article 14, his delegation, while generally endorsing the principles which it embodied, believed that a norm of that nature should be sufficiently broad to avoid giving rise to ambiguities and misinterpretations.

The meeting rose at 12.50 p.m.